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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

OXBOW CARBON, LLC, et al., Plaintiffs and Respondents, v. KIRBY MARTENSEN, et al. Defendants, AMERICAN FRONTIER (MARINE), INC. et al., Real Parties in Interest and Appellants.	A142883 (Contra Costa County Super. Ct. No. N12-1956)

This appeal involves a third party discovery dispute arising out of a lawsuit filed in Florida. After the appeal was fully briefed, respondents moved to dismiss the appeal as moot, on the ground that the underlying action was dismissed pursuant to a settlement. Appellants oppose dismissal of the appeal. For the reasons set forth before, we will dismiss the appeal as moot.

FACTUAL AND PROCEDURAL BACKGROUND

In March 2012, plaintiffs initiated an action in Florida state court against a former employee. As part of this Florida action, plaintiffs sought third-party discovery from appellants in California by serving deposition subpoenas on their counsel. Appellants objected to the subpoenas, and plaintiffs filed a motion to compel. Appellants never filed an opposition to this motion to compel. On July 11, 2014, the trial court issued a

tentative ruling which stated "No opposition on file. Motion granted." Appellants did not respond to the tentative ruling, and on July 25, 2014, the trial court entered an order granting plaintiffs' motion to compel (Compliance Order).

On August 6, 2014, appellants moved for reconsideration of the Compliance Order, arguing, among other things, that they did not receive proper notice or service of plaintiffs' motion to compel. Included in this motion was a request for attorney fees and expenses under Code of Civil Procedure sections 2023.030, subdivision (a) and 2025.480, subdivision (j).[1] Because appellants could not secure a hearing on the motion to reconsider prior to the date noticed for the deposition, they filed an ex parte application to stay the Compliance Order until the trial court could hear their motion for reconsideration. Following a hearing on August 28, 2014, the trial court denied the ex parte application. On September 2, 2014, appellants filed a notice of appeal, appealing both the Compliance Order and the denial of their ex parte application for a stay. Appellants then withdrew their motion for reconsideration from the trial court, stating that it was "moot" in light of their pending appeal.

On June 2, 2015, following completion of the briefing in this appeal, the underlying Florida action was dismissed pursuant to a settlement. Plaintiffs have now moved to dismiss the appeal as moot, arguing that the Compliance Order no longer has any "real-world effect." Appellants oppose dismissal, contending that their entitlement to attorneys fees and costs under sections 2023.030, subdivision (a)[2] and 2025.480, subdivision (j)[3] is not moot.

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[1] All further undesignated statutory references are to the Code of Civil Procedure.

[2] Section 2023.030, subdivision (a) provides: "The court may impose a monetary sanction ordering that one engaging in the misuse of the discovery process . . . pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct. . . . If a monetary sanction is authorized by any provision of this title, the court shall impose that sanction unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust."

[3] Section 2025.480, subdivision (j) provides: "The court shall impose a monetary sanction . . . against any party, person, or attorney who unsuccessfully makes or opposes

DISCUSSION

"When the court cannot grant *effective* relief to the parties to an appeal, the appeal must be dismissed." (*In re I.A.* (2011) 201 Cal.App.4th 1484, 1490.) The policy behind this rule is that "courts decide justiciable controversies and will normally not render advisory opinions." (*Ebensteiner Co., Inc. v. Chadmar Group* (2006) 143 Cal.App.4th 1174, 1179.) Following the settlement of the Florida action, plaintiffs' deposition subpoenas, and the Compliance Order requiring appellants to comply with them, became moot. Therefore, an order from this court affirming or reversing the Compliance Order would not provide the parties with any effective relief.

Appellants' argument that their claims for attorney fees and expenses are not moot is unavailing. Appellants rely primarily on *Indio Police Command Unit Assn. v. City of Indio* (2014) 230 Cal.App.4th 521. In that case, the trial court granted plaintiffs' request for a permanent injunction and made a post-judgment order granting plaintiff PCU (an employee organization) its attorney fees under section 1021.5, the private attorney general fee statute. During the pendency of the appeal, the permanent injunction was dissolved after defendant City of Indio performed all of the acts required by the injunction. (*Id.* at p. 534.) Plaintiffs argued this made the appeal moot, but the court disagreed, stating that "the merits of the injunction must be addressed because 'the propriety of the trial court's ruling on the merits of the action determines whether [plaintiff] was eligible for an award of attorney fees [under . . . section 1021.5] as the successful party.' " (*Ibid.*) Thus, in that case, the only way for the appellate court to review the challenge to the already outstanding attorney fee award was to review the merits of an arguably moot underlying dispute. The other cases cited by appellants are similar, where attorney fees had already been awarded by the trial court. (*Mapstead v. Anchundo* (1998) 63 Cal.App.4th 246, 277-279 [appeal moot, but merits addressed in connection with appeal from attorney fee order]; *Save Our Residential Environment v.*

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a motion to compel an answer or production, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust."

City of West Hollywood (1992) 9 Cal.App.4th 1745, 1750-1751 ["Even if this appeal were otherwise moot . . . the trial court's award of attorney fees to [plaintiff] pursuant to . . . section 1021.5 would preclude us from dismissing the appeal."])

The matter before us is different. Here, there has been no award of attorney fees. Even if appellants were to prevail in this now moot discovery dispute on appeal, their entitlement to fees, which has never been adjudicated, would not be established. In essence, appellants are asking us to adjudicate various issues related to plaintiffs' motion to compel,[4] and, depending upon the outcome, to remand the case to the trial court to determine in the first instance both the merits of the now moot discovery issue and whether attorney fees and costs would have been warranted under section 2023.030, subdivision (a) or section 2025.480, subdivision (j).[5] Appellants have cited no authority for this attenuated proposition.[6]

DISPOSITION

The appeal is dismissed as moot.

[4] In their opening brief, appellants seek to have this court adjudicate whether the underlying subpoenas were overbroad. However, this argument was only presented to the trial court in appellants' motion for reconsideration which appellants withdrew in light of this appeal. As a result, the trial court has never even adjudicated the overbreadth issue.

[5] As discussed above, the only request for attorney fees was made in a motion for reconsideration that appellants then withdrew as moot from the trial court. So, in fact, we would be remanding to permit the appellants to bring a motion for attorney fees on which the trial court could then rule, and the losing party could then appeal—all in an action involving a moot discovery dispute.

[6] We also reject appellants' argument that this case raises important issues that are capable of repetition and yet evading review.

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Miller, J.

We concur:

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Kline, P. J.

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Richman, J.

A142883, *Oxbow Carbon LLC v. Kirby Martensen*